08/16/96



UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION



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| CRYSTAL OIL COMPANY AND CRYSTAL EXPLORATION AND PRODUCTION COMPANY, Plaintiffs, | § | CASE NO. CV 95-2115S |
| vs. | § | JUDGE STAGG |
| ATLANTIC RICHFIELD COMPANY, Defendant. | § | MAGISTRATE JUDGE PAYNE |

**MEMORANDUM OPPOSING APPEAL OF PLAINTIFFS FROM MEMORANDUM RULING CONCERNING TRANSFER OF CONTRACT RELEASE CLAIM AND CERCLA COUNTERCLAIM TO COLORADO**

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## INTRODUCTION

The parties presented the Magistrate Judge with no less than five detailed briefs and appendices[1] debating the issue of whether the two pending claims and one pending counterclaim originally filed before this Court should be heard in Colorado or Louisiana. After pouring through this voluminous material, the Magistrate Judge concluded that "[s]imply put, it is a Colorado-based controversy, largely involving Colorado witnesses, Colorado evidence, some aspects of Colorado law and strong Colorado interests." Memorandum Ruling at 14. In turn, he concluded that defendant, Atlantic Richfield Company ("ARCO"), had more than satisfied its burden to show that the venue should properly be transferred to Colorado with respect to the contract claim and CERCLA counterclaim.

No amount of additional briefing or appellate proceedings can change this basic truth. Plaintiffs have introduced no new arguments or rationale supporting a contrary decision by this Court. Rather than burden the Court with a detailed recitation of the numerous legal and factual considerations pinpointed in ARCO's prior briefs supporting venue transfer, we briefly respond here to the grounds covered yet again by plaintiffs which purportedly justify the opposite conclusion from that reached by the Magistrate Judge.

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[1] Defendant hereby incorporates the Record on Appeal identified by plaintiffs in their Appeal Memorandum at 12.

## ARGUMENT

### I. PLAINTIFFS' SELF-SERVING NOTIONS OF HOW THIS CASE SHOULD PROCEED PROVIDE NO SUPPORT FOR OVERRULING THE MAGISTRATE'S DECISION

Relying on their idealized view about how this case should proceed, plaintiffs raise several examples of perceived incongruities or unfairness which would result from the transfer of the contract and CERCLA-based claims to Colorado. Each of these perceived problems can be easily dismissed.

First, plaintiffs complain that the Magistrate's Order of Transfer[2] may result in interference with the Bankruptcy Court's resolution of the Bankruptcy Discharge Claim. See plaintiffs' Appeal Memorandum at 5. ("If ARCO persuades the District Court in Colorado to proceed with the CERCLA Counter-Claim [sic] against Crystal before decision on the Bankruptcy Discharge Claim, this would plainly interfere with the Bankruptcy Court's resolution of that Claim.") This risk is exacerbated, plaintiffs argue, by the fact that "ARCO wishes to proceed promptly" with its CERCLA counterclaim in the District Court of Colorado. Id.

Plaintiffs' concern is entirely illusory. The Magistrate's Order, as it currently stands, specifically allows the Bankruptcy Discharge Claim to proceed, while the Order of Transfer pertaining to the contract and CERCLA claims is stayed pending this appeal. Thus, there is no current prospect that ARCO's CERCLA counterclaims against Crystal Oil Company ("Crystal") will proceed

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[2] Defined terms used in this Memorandum are defined consistently in the same manner as plaintiffs' Appeal Memorandum, unless otherwise stated.

before or interfere with the Bankruptcy Court's resolution of that claim. Moreover, if plaintiffs are successful in obtaining a discharge ruling from the Bankruptcy Court regarding ARCO's direct claim against Crystal, such ruling presumably would have equal effect on ARCO's ability to pursue its CERCLA counterclaim against Crystal, if any, regardless of whether the counterclaim is pending in Colorado or Louisiana.

Plaintiffs' "interference with the wheels of justice" argument also is premised on their mistaken view that the Bankruptcy Discharge Claim completely overlaps with ARCO's counterclaim. This ignores components of ARCO's CERCLA counterclaim which are independent of the Bankruptcy Discharge Claim. For one, ARCO's counterclaim against Crystal Exploration and Production Company ("CEPCO") is unaffected by the bankruptcy, which by plaintiffs' own admission did not discharge CEPCO's liabilities. In addition, Crystal's complete control over CEPCO as its alter ego after the alleged 1986 discharge date may create an independent basis to support ARCO's CERCLA counterclaim against Crystal, notwithstanding the outcome of the Bankruptcy Discharge Claim.

Moreover, once the Order of Transfer to Colorado is effectuated, ARCO will file counterclaims against a number of Colorado-based entities, as well as NL Industries, Inc., as described in its prior submittals to the Magistrate. Subsequent cross-claims filed by such defendants against Crystal or CEPCO will not be governed by whatever decision is reached on the Bankruptcy Discharge Claim between plaintiffs and ARCO. Thus, as the

Magistrate recognized, there is every reason to transfer the CERCLA and contract claims to Colorado notwithstanding the pendency of the Bankruptcy Discharge Claim in Louisiana.[3]

Plaintiffs also contend that the Order of Transfer would place them in the "grossly unfair" position of defending the CERCLA claim without first determining the "clear cut" issue of whether CEPCO has been contractually released from this claim. Appeal Memorandum at 6. This argument conveniently overlooks the Magistrate's finding that the contract release claim presents compelling issues of Colorado law, policy and fact, and clearly is best resolved, whether on summary judgment or at trial, in a Colorado court. In plaintiffs' view, their narrow defense to CERCLA liability (based on a vague contractual provision developed prior to CERCLA's enactment, which constitutes neither a release nor an indemnity) should be decided immediately by a Louisiana court, simply because they chose this forum and regardless of the overwhelming weight of factors favoring transfer. This argument makes a convenient end-run around the Magistrate's holding that if

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[3] Plaintiffs place great relevance on off-hand suggestions in the Magistrate's Memorandum Ruling that the Colorado action will presumably not proceed to its merits if the Bankruptcy Court rules that ARCO's claims have been discharged. Appeal Memorandum at 4-5. Plaintiffs claim that this assumption is "clear error" because "this is not how ARCO wishes to proceed." Id. Apart from the question of the relevance of how "ARCO wishes to proceed," the Magistrate's off-hand suggestion falls far short of the "clear error" sufficient to justify reversal of his opinion. Instead, the statement simply reflects a practical view that the bankruptcy determination, involving the better-financed parent company, Crystal, may have an impact on the ultimate outcome of the case.

CEPCO truly has an iron-clad contractual defense to CERCLA liability, that remedy can easily be pursued in Colorado[4] and, in fact, is best resolved there. It would be "grossly unfair" to ARCO, not Crystal, if its clear right to have such a dispute resolved under Colorado law is undermined by plaintiffs' attempt to put their contractual "cart" before the CERCLA "horse."

## II. THE MAGISTRATE CORRECTLY HELD THAT ARCO'S CERCLA/CONTRACT CLAIMS HAVE LITTLE MEANINGFUL CONNECTION TO LOUISIANA

After fruitlessly attempting to show that the Transfer Order impedes plaintiffs' quest for prompt justice in this case, plaintiffs resort to a tired regurgitation of their prior arguments regarding the appropriate locus of this dispute. First, plaintiffs attempt to resurrect the notion that their choice of a Louisiana forum is entitled to considerable deference by alleging that they have uncovered new evidence that the matter has a meaningful connection to Louisiana. This "new evidence" comes in the form of the fact that the initial arrangement for sale of the Rico property from CEPCO to ARCO's predecessor, known as the Purchase Agreement, was executed by CEPCO in Louisiana (ARCO's predecessor executed the document in Colorado). Yet, this fact has been apparent from the outset of this case, given that the place of execution is clear on the face of the document. Purchase Agreement at 9 (showing

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[4] Plaintiffs turn the Magistrate's Memorandum Ruling on its head by implying that the Ruling suggests that the contract claim can be decided as well by a Louisiana court as any other. See Appeal Memorandum at 6, purportedly quoting the Memorandum Ruling at 16, note 5. In fact, what the Magistrate said in his opinion was that any summary judgment remedy available to plaintiffs could be pursued "as easily in Colorado as in Louisiana." Id.

notarization of CEPCO's signature in Louisiana). What Crystal conveniently fails to point out is that not a single term or provision of the Purchase Agreement is cited in either plaintiffs' Complaint or its numerous prior briefs as relevant to the resolution of the Contract Release Claim. Instead, the entire contractual interpretation case turns on the Closing Agreement, which was unquestionably drafted, negotiated and executed in Colorado, with Colorado lawyers on both sides of the transaction.

Thus, plaintiffs' allegation that the "negotiation and execution of the contract, upon which the Contract Release Claim turns, are significantly connected to this forum," see Appeal Memorandum at 8 (emphasis added), is blatantly misleading. The plain truth is that the reason that this argument was not raised earlier is that the initial Purchase Agreement is not even germane to the contractual interpretation issues presented here. Indeed, CEPCO's Motion for Summary Judgment on the contract claim states that the Closing Agreement "expressly addresses the allocation of environmental responsibilities" (CEPCO Mot. Sum. J. at 2) and not one argument made in the Motion and supporting papers is based on the Purchase Agreement.

In short, the Magistrate was entirely correct in concluding that this Colorado mining clean-up controversy has almost no connection to Louisiana and is firmly grounded in Colorado-based parties, witnesses, evidence, law and policy. Based on the inherent Colorado nature of this controversy, the Magistrate appropriately adopted a standard of limited deference to plaintiffs' choice of forum, particularly since the forum was

clearly designed to constitute a "preemptive strike" against meaningful discussion and negotiation of plaintiffs' CERCLA liabilities. See ARCO's Original Memorandum at 6.

## III. ARCO MORE THAN MET ITS BURDEN OF IDENTIFYING COLORADO WITNESSES AND INDICATING THE NATURE OF THEIR TESTIMONY.

Plaintiffs next complain (once again) that ARCO's detailed and specific affidavit describing Colorado-based witnesses and the nature of their testimony failed to meet its legal burden. Notwithstanding that this issue was extensively briefed before and discussed by the Magistrate, see Memorandum Ruling at 15-16; ARCO's Reply Memorandum at 7; ARCO's Final Reply Memorandum at 4-5, plaintiffs argue that the Magistrate erred in the basic task of reviewing ARCO's potential witness list and considering the substance of the testimony and the nexus to Colorado. Plaintiffs support their argument by stating that the moving party must go beyond general allegations of inconvenience and identify necessary witnesses and indicate what their testimony at trial will be. See Appeal Memorandum at 9, quoting Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 218 (2nd Cir. 1978) cert. denied, 440 U.S. 908 (1979). See also Appeal Memorandum at 10, citing Riso Kagako Corp. v. A.B. Dick Company, 300 F. Supp. 1007, 1010 (S.D. N.Y. 1969) (noting that an affidavit must detail name and location of potential witnesses and the "substance" of their testimony).

This is exactly what ARCO did. In fact, ARCO went beyond identifying these witnesses and "indicating" the substance of their testimony--even though this controversy was in the early stages of litigation, ARCO specifically listed the name, last known location

and specific role of each potential witness and described in clearly sufficient detail the nature of their testimony and its relationship to this matter. The Magistrate appropriately recognized that this detailed affidavit, listing over 50 witnesses, clearly met ARCO's burden of establishing the propriety of transferring this litigation to Colorado based in part on witness convenience and accessibility. The Magistrate also appropriately recognized that many of these individuals no longer work for ARCO and therefore would be particularly inconvenienced if required to attend trials and other proceedings in Louisiana.

Under any test, this affidavit clearly provided a sufficient "indication" of the "substance" of these witnesses' testimony. Barr Laboratories, Inc. v. Quantum Pharmics, Inc., 827 F. Supp. 111, 114 (E.D. N.Y. 1993) (requiring identity of witnesses and a "general" description of the substance of testimony). By reiterating these standards in their latest brief, plaintiffs only underscore that the Magistrate was fully justified in his decision.

## IV. THE MAGISTRATE CORRECTLY HELD THAT THE OVERALL CIRCUMSTANCES OF THE PENDING CASE SUPPORT TRANSFER TO COLORADO.

Finally, plaintiffs again attempt to characterize this case as a stream-lined, clear-cut fait accompli which will quickly lead to their exoneration for extensive past contamination derived from their past mineral resource extraction activities in Colorado. Playing on this theme, plaintiffs characterize ARCO's CERCLA counterclaims as an "excuse" to transfer issues in this case to Colorado, contending that virtually all of ARCO's arguments for venue transfer are based on this counterclaim tactic.

Plaintiffs are wrong on at least two counts. First, ARCO's motion to transfer this matter to Colorado relies heavily on the fact that the controversy underlying plaintiffs' claims is solidly rooted in Colorado, not Louisiana, Memorandum Ruling at 2, 14-15, and that, the contractual claim involving CEPCO, at issue in this appeal, expressly requires this matter to be resolved under Colorado law. See Memorandum Ruling at 16-18 (citing the need to apply Colorado law as a key factor supporting transfer in the "interests of justice"). That the same considerations apply to ARCO's CERCLA cross-claim against plaintiffs does not detract from the validity of the Magistrate's findings.

Second, plaintiffs clearly "grasp at straws" by arguing that the compulsory nature of ARCO's CERCLA counterclaim precluded the Magistrate from considering the need to join Colorado parties as a factor in supporting transfer to Colorado. ARCO never argued that the pendency of its counterclaim against Crystal, which under Fed. R. Civ. P. 13 does not require the presence of third parties, was an important factor to consider in approving transfer to Colorado. Instead, ARCO's point was that the magnitude, extent and proper allocation of CERCLA costs at the Rico site, by its very nature, involves a host of third parties and considerations integrally tied to Colorado. ARCO's Original Memorandum at 18-21; ARCO's Reply Memorandum at 9-10. ARCO never suggested that its compulsory counterclaim against plaintiffs would require the inclusion of the third parties, just that other parties would be subject to independent, third-party claims that were best prosecuted together in Colorado. Crystal's effort to create some

sort of "estoppel" out of ARCO's attempts to streamline a complex CERCLA litigation ignores the gist of this aspect of the Magistrate's ruling, which was grounded on notions of overall judicial economy, not a hypertechnical view of ARCO's CERCLA counterclaim.

## CONCLUSION

Exercising its broad discretion in these matters, the Magistrate clearly delved deeply into the detailed legal and factual materials previously developed in voluminous briefs on this matter, and determined that ARCO had sustained its burden in seeking transfer of the contract claim and CERCLA counterclaim to a Colorado court. In so doing, the Magistrate correctly applied governing legal standards surrounding this matter to the facts of this dispute and appropriately ruled that the contract claim and CERCLA counterclaim were far more appropriately tried in Colorado. This finding should not be disturbed on this appeal.[5]

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[5] ARCO has appealed the portion of the Magistrate Judge's Ruling directing that the Bankruptcy Discharge Claim be referred to the Bankruptcy Court. However, in so doing, ARCO has not questioned the Magistrate's detailed review of the record and application of relevant law and fact. Instead, ARCO believes that one particular legal point raised by ARCO was overlooked in the opinion, and, once considered, may provide a basis for a different conclusion by this Court.

Shreveport, Louisiana, this 16th day of August, 1996.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the above and foregoing Memorandum Opposing Appeal of Plaintiffs From Memorandum Ruling Concerning Transfer of Contract Release Claim and CERCLA Counterclaim to Colorado have been served upon plaintiffs' counsel of record, Osborne J. Dykes, III, Fulbright & Jaworski L.L.P., 1301 McKinney, Suite 5100, Houston, Texas 77010-3095, and Albert M. Hand, Jr., Cook, Yancey, King & Galloway, P. O. Box 22260, Shreveport, Louisiana 71120-2260, by depositing copies of same in the U.S. Mail, properly addressed, with adequate postage affixed thereto.

Shreveport, Louisiana, this 16th day of August, 1996.

OF COUNSEL